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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte LEV HASIDASHVILI

Appeal 2015-000304
Application 13/199,532¹
Technology Center 3700

Before HUBERT C. LORIN, BRUCE T. WIEDER, and
TARA L. HUTCHINGS, *Administrative Patent Judges*.

WIEDER, *Administrative Patent Judge*.

DECISION ON APPEAL

This is a decision on appeal under 35 U.S.C. § 134 from the Examiner's rejection of claims 1–20. We have jurisdiction under 35 U.S.C. § 6(b).

We AFFIRM.

CLAIMED SUBJECT MATTER

Appellant's claimed invention relates "to an applicator for fluid products, such as soap and lotion products." (Spec. 2.)

Claims 1, 13, and 16 are the independent claims on appeal. Claim 1 is representative. It recites (some paragraphing added):

¹ According to Appellant, the real party in interest is Lev Hasidashvili. (Appeal Br. 2.)

1. A manual applicator utilizing one hand for manually dispensing and applying fluid products to a surface to be treated comprising

a base, the base having a region for holding a container for such products,

the container having at least one dispensing channel of a defined shape,

a lower part of the base having at least one base channel of a defined shape coordinated with the defined shape of the dispensing channel,

a cover attached to the base and at least partially open in the region of the applicator above the container to form an opening, the opening of a size to receive at least one finger,

a fitment depending from the cover and comprised of an inner portion and an outer portion, one of the inner portion and the outer portion connected to the cover and contactable by the at least one finger through the opening,

one of the inner portion and the outer portion moveably attached to the other whereupon [sic] the relative movement of the outer portion and the inner portion one of the inner portion and the outer portion moves toward the container to thereby apply a force to the container and dispense the fluid product from the container through the at least one dispensing channel and the at least one base channel to an applicator surface,

whereby at least one of the inner portion and the outer portion can be contacted by the at least one finger through the opening in the at least partially open cover and manipulated for relative movement to manually dispense product during the process of applying the fluid product to the surface to be treated.

REJECTIONS

Claims 1–6 and 8–20 are rejected under 35 U.S.C. § 103(a) as unpatentable over Hamilton (US 1,576,821, iss. Mar. 16, 1926) and deVirag (US 2008/0131191 A1, pub. June 5, 2008).

Claim 7 is rejected under 35 U.S.C. § 103(a) as unpatentable over Hamilton, deVirag, and Gebhard (US 5,186,563, iss. Feb. 16, 1993).

ANALYSIS

Claims 1, 12, 13, 16, and 20

Appellant argues that “[i]t is stated in the rejection over Hamilton that Hamilton shows a manual applicator with a base 3. Part 3 is described as a removable closure (page 1, lines 54–55). There is no described base.” (Appeal Br. 12.)

Claim 1 recites “a base, the base having a region for holding a container for such products” and that “a lower part of the base having at least one base channel of a defined shape coordinated with the defined shape of the dispensing channel.”

Hamilton discloses that “the bottom portion of the closure 3 is formed with an opening and with an annular depending flange 8 around the same.” (Hamilton, pg. 1, ll. 74–77.) The discharge neck of the compressible tube may be threaded through the opening in the base. (*See id.* at pg. 1, ll. 79–83.) In other words, the bottom portion of the closure has a region for holding the neck of the tube and a defined shape coordinated with the defined shape of the neck of the tube. Therefore, we are not persuaded that Hamilton does not disclose a base as recited in claim 1.

Claim 1 also recites “a fitment depending from the cover and comprised of an inner portion and an outer portion, one of the inner portion and the outer portion connected to the cover and contactable by the at least one finger through the opening.” Appellant argues that

[i]t is stated that [Hamilton discloses a] plate (ram) 27 and threaded rod (longitudinal screw) 32 depend from an inner surface of stationary closure 2. Part 32 is a longitudinal screw which passes through the cover 2 to a handle 34 on the upper end. Plate (ram) 27 is indirectly attached to longitudinal screw 32 via bar 28. It is not directly attached to the longitudinal screw 32. Also it is very clear that they do not depend from an inner surface of the stationary cover 2.

(Appeal Br. 12.)

Hamilton discloses that “[t]he upper end of the screw is swiveled as at 33 in the closed end 2 of the casing 1.” (Hamilton, pg. 1, ll. 108–109; *see also id.* at Fig. 1.) Hamilton further discloses that by turning the handle at the end of the screw “in the proper direction, the ram 27 will be forced downwardly, thus compressing the tube 12 for the purpose of discharging its contents.” (*Id.* at pg. 2, ll. 1–4.) In other words, as shown in Figure 1 of Hamilton, screw 32 depends from cover 2 via swivel 33 which holds screw 32 in place longitudinally relative to cover 2. Therefore, we are not persuaded of error.

Claim 1 also recites “a cover attached to the base and at least partially open in the region of the applicator above the container to form an opening, the opening of a size to receive at least one finger.”

The Examiner finds that “Hamilton does not disclose that the cover has an opening and that at least one of the inner and outer portions of the fitment can be contacted through the opening in the cover.” (Final Action 3.) Looking to deVirag, the Examiner determines that it

teaches an applicator with a fitment (150) that is accessible through an opening in a cover (120) for the purpose of preventing inadvertent actuation of the fitment (paragraph [0025]). deVirag also teaches that this arrangement is capable of being used with one hand (a user’s thumb can rest on the grip portion of the

device and a middle or ring finger can actuate the wheel). Accordingly, it would have been obvious to one of ordinary skill in the art at the time the invention was made to have modified the apparatus of Hamilton to use the manual actuation means taught by deVirag for the purpose of preventing inadvertent actuation of the fitment.

(*Id.*)

Appellant argues that

[t]here is no disclosure of an opening in the body 120 or 202 in deVirag, and particularly one of a size through which a finger can be extended. There is disclosed a recess 220 for wheel 218 (0029). deVirag defines part 220 as a recess and not an opening through which a finger can be extended. The wheel 150 is not within the body 120 thus no opening in the body 120 is needed.

(Appeal Br. 12.)

Figure 2 of deVirag discloses that recess 220 includes an opening in the body 202 that allows access to the wheel 218 by a finger of the user contacting the wheel so as to rotate the wheel. deVirag additionally discloses that the “manually rotatable wheel 218 . . . can be accessed through a recess 220 in the body 202” and that, although deVirag discloses a motor coaxial with the wheel, “the motor 212 can be omitted completely, leaving the manual input of power the sole source of pressure used to dispense material.” (deVirag ¶ 29.)

Therefore, we are not persuaded that deVirag does not disclose an opening in the body 202.

Independent claims 13 and 16 contain similar language to that discussed above with regard to claim 1. Appellant argues that “[i]ndependent claims 1, 13, and 16 have not been individually examined,” that “[t]here are not specific rejections of these independent claims,” and

that Appellant is “left to suppose what the rejections would be extrapolating from the group rejection of claims 1, 12, 13, and 20.” (Appeal Br. 13–14.) Appellant does not, however, point to specific limitations in claims 12, 13, 16, or 20 that were not addressed in the rejection of claim 1. (*See* Appeal Br. 13–14; *see also* Answer 2–3.) Thus, we are not persuaded of reversible error.

Additionally, we agree with and adopt the Examiner’s rationale for rejecting claims 1, 12, 13, 16, and 20 on pages 2–3 of the Answer.

Claim 2

Claim 2 recites: “A manual applicator as in claim 1 wherein the applicator has a shape that has one of a circular periphery and a generally rectangular periphery.”

The Examiner finds that Hamilton does not disclose the shape of its applicator but that

Applicant has not disclosed that the shape of the applicator solves a stated problem or provides a particular advantage.” Accordingly, one of ordinary skill in the art would have considered using a circular or rectangular applicator to be an obvious matter of design choice which fails to patentably distinguish over the prior art.

(Final Action 3.) Appellant argues that Hamilton does show the shape of its applicator “by showing it as an elongated tube 1. The present applicator is very different from the elongated tube of Hamilton.” (Appeal Br. 13.)

As an initial matter, Appellant has not persuasively argued why the Examiner erred in determining that “one of ordinary skill in the art would have considered using a circular or rectangular applicator to be an obvious matter of design choice which fails to patentably distinguish over the prior

art.” (Final Action 3.) Moreover, claim 2 recites that the claimed applicator “has one of a circular periphery and a generally rectangular periphery,” i.e., that a two-dimensional view of the claimed applicator (a circle and a rectangular both being two-dimensional shapes) would show either a circular periphery or a generally rectangular periphery. Figure 3 of Hamilton shows, in a two-dimensional view of the prior art applicator, that it has a circular periphery.

Therefore, we are not persuaded that the Examiner erred in rejecting claim 2.

Claims 3, 4, 5, 14, 15, 17, and 18

Claim 3 recites: “A manual applicator as in claim 1 wherein the outer portion is moveably attached to the inner portion by threads.”

We agree with the Examiner that, e.g., “[t]he threaded rod (32) could be considered the outer portion because it extends outside the cover” and that “the plate (27) . . . could be considered the inner portion because it is contained inside the cover. (Final Action 3.) Thus, we are not persuaded of error by Appellant’s assertion that “[t]here is no disclosure of such portions in Hamilton. (See Appeal Br. 13.)

For the same reason, we are not persuaded of error by Appellant’s argument regarding claims 4, 5, 14, 15, 17, and 18 that the Examiner is “reconstructing” the claimed inner and outer portions “into the same part.”

Claim 6

Claim 6 recites: “A manual applicator as in claim 1 wherein the container has more than one dispensing channel of a defined shape on a

lower surface, the more than one dispensing channel of a defined shape interfitting into more than one base aperture.”

The Examiner finds that Hamilton “disclose[s] one dispensing channel and one base channel.” (Final Action 4.) The Examiner rejects claim 6 noting that “[i]t has been held that a mere reproduction of parts has no patentable significance unless a new and unexpected result is produced.” (*Id.*, citing *In re Harza*, 274 F.2d 669, 774 (CCPA 1960).)

Appellant argues that “Applicant is not claiming a plurality of parts versus a single part” and thus, that *Harza* “is not applicable.” (Reply Br. 4; *see also* Appeal Br. 13.) But Appellant does not persuasively argue *why* the claimed “more than one dispensing channel” and “more than one base aperture” are not a plurality of parts under *Harza*. *See Harza*, 274 F.2d at 774. Moreover, Appellant does not argue that the claimed “more than one dispensing channel” and “more than one base aperture” produce a new and unexpected result. Therefore, we are not persuaded of error.

Claim 8

Claim 8 recites: “A manual applicator as in claim 1 whereon a lower portion of the base has an applicator surface that is compatible with the surface to be treated.”

Appellant argues that the Examiner states “that a lower portion of the base (no base in Hamilton) has a surface 13 that is compatible with the surface to which the paste is to be applied. There is no disclosure as to the surface to which the Hamilton paste is to be applied.” (Appeal Br. 13.)

The Examiner answers that “the claim merely requires the applicator surface to be ‘compatible’ with the target surface. The limitation

‘compatible’ is very broad, and as the applicator disclosed by Hamilton does not appear to cause destruction of surfaces it reads on the claim.”

(Answer 8.)

Appellant does not dispute the Examiner’s construction of the term “compatible” or that, using this construction, Hamilton teaches an applicator surface compatible with the surface to be treated. (*See* Reply Br. 4.)

Therefore, we are not persuaded of error.

Claims 9 and 10

Appellant argues claims 9 and 10 together. We choose claim 9 as representative. Claim 9 recites: “A manual applicator as in claim 1 wherein the container dispensing channel has a non-circular defined shape which mates with a non-circular defined shape of the base channel.”

Appellant argues that “the Examiner appears to be citing personal knowledge. There is no such disclosure in Hamilton.” (Appeal Br. 13; *see also* Reply Br. 4.) The Examiner, however, does not rely on personal knowledge. Rather, the Examiner determines that “one of ordinary skill in the art would have considered using non-circular channels of any shape in place of the circular channels of Hamilton to be an obvious matter of design choice which fails to patentably distinguish over the prior art.” (Final Action 4.) Appellant does not persuasively argue why the Examiner’s determination is erroneous.

Nonanalogous art

Appellant argues that “neither of the primary reference of Hamilton and secondary reference of deVirag is directed to applying a cleaning

product to a surface, and in particular to one's skin surface during bathing.” (Appeal Br. 11.) But claim 1 is not so limited. It is directed more generally to “applying fluid products to a surface to be treated.” Regardless, Appellant further argues that “[a] main problem with all of the rejections is that the cited references are not in the same art area as the claimed invention.” (*Id.* at 14.)

We consider this to be a nonanalogous art-type argument.

The analogous-art test requires that the Board show that a reference is either in the field of the applicant's endeavor or is reasonably pertinent to the problem with which the inventor was concerned in order to rely on that reference as a basis for rejection. *In re Oetiker*, 977 F.2d 1443, 1447 (Fed.Cir.1992). References are selected as being reasonably pertinent to the problem based on the judgment of a person having ordinary skill in the art. *Id.* (“[I]t is necessary to consider ‘the reality of the circumstances,’—in other words, common sense—in deciding in which fields a person of ordinary skill would reasonably be expected to look for a solution to the problem facing the inventor.” (quoting *In re Wood*, 599 F.2d 1032, 1036 (C.C.P.A. 1979))).

In re Kahn, 441 F.3d 977, 986–87 (Fed. Cir. 2006).

Appellant's Specification is entitled “An Applicator for Fluid Products.” (Spec. 1.) Hamilton discloses “improvements in means for holding and compressing collapsible tubes, such as those in which various kinds of pastes are marketed, and the invention is intended primarily for use in connection with an applicator to which the contents of the tube are delivered when said tube is compressed or collapsed.” (Hamilton, pg. 1, ll. 12–19.) “[G]els, slurries, and pastes” are fluids, i.e., non-Newtonian fluids. See Tony Atkins and Marcel Escudier, *A Dictionary of Mechanical Engineering*,

<http://www.oxfordreference.com/view/10.1093/acref/9780199587438.001.0001/acref-9780199587438-e-4168> (last visited Jan. 17, 2017). Thus, like the claimed invention, Hamilton relates to an applicator for fluid products.

deVirag is entitled “Spreadable Fluid Material Dispenser Apparatus.” Specifically, deVirag discloses “an apparatus that dispenses fluid material and facilitates spreading of the material on a surface.” (deVirag ¶ 23.)

Additionally, Gebhard (US 5,186,563) is entitled “Fluid Dispenser with Applicator Member.”

In short, the references relied on by the Examiner are in the field of fluid applicators and are reasonably pertinent to the problem of applying a fluid to a surface. Therefore, we are not persuaded that Hamilton, deVirag, or Gebhard are nonanalogous art.

Hindsight

Appellant also argues that “[t]he Examiner is using the Applicant’s disclosure as a blueprint to reconstruct the claimed invention using random parts from random references.” (Appeal Br. 14.) Appellant explains that “[t]he basic problem with the present examination is that the cited references are not very pertinent to the claimed invention.” (*Id.*)

However, as discussed above, the references relied on by the Examiner are in the field of fluid applicators and are reasonably pertinent to the problem addressed by the claimed invention. Additionally, we agree with the Examiner

that any judgment on obviousness is in a sense necessarily a reconstruction based upon hindsight reasoning. But so long as it takes into account only knowledge which was within the level of ordinary skill at the time the claimed invention was made, and

does not include knowledge gleaned only from the applicant's disclosure, such a reconstruction is proper. See *In re McLaughlin*, 443 F.2d 1392, 170 USPQ 209 (CCPA 1971).

(Answer 9–10). Appellant does not persuasively argue that the Examiner relied on “knowledge gleaned only from the applicant's disclosure” or otherwise used improper hindsight.

Other arguments

Appellant's other arguments have been considered but are not deemed persuasive of reversible error.

DECISION

The Examiner's rejections of claims 1–20 under 35 U.S.C. § 103(a) are affirmed.

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv).

AFFIRMED